Case Nos. 18-2012, 19-2225, 18-2249, 18-2253, 18-2281, 18-2332, 18-2416, 18-2417, 18-2418, 18-2419, 18-2422, 18-2650, 18-2651, 18-2661, and 18-2724

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

In re National Football League Players' Concussion Injury Litigation

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Appeal from the United States District Court
For the Eastern District of Pennsylvania
(Hon. Anita B. Brody, No. 2:14-md-02323-AB and MDL No. 2323)

APPELLANT ZIMMERMAN REED'S BRIEF ADDRESSING THE COMMON BENEFIT FEE ALLOCATION ORDER

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STATEMENT OF JURISDICTION

The district court had original jurisdiction over this matter under 28 U.S.C. § 1332(d). Zimmerman Reed timely appealed the district court's May 24, 2018 order ("Allocation Order") allocating common-benefit attorney's fees. JA24; JA84; JA8971. The Allocation Order is a final order that sets fees at a "definitive amount" and is subject to an immediate appeal over which this Court has Jurisdiction pursuant to 28 U.S.C. § 1291. *See United Auto Workers Local 259 Soc. Sec. Dep't v. Metro Auto Ctr.*, 501 F.3d 283, 286 (3d Cir. 2007).

ISSUES

1. Did the district court commit clear error when it accepted Seeger Weiss's recommendation that certain work performed by Zimmerman Reed on the Ethics Committee warranted no additional multiplier even though Seeger Weiss recommended the court consider similar work when awarding its multiplier?

2. Did the district court commit clear error in awarding lodestar multipliers by inconsistently applying its determination that the risk of non-payment of a large lodestar was the type of risk that warranted a multiplier and by improperly dismissing the benefit to the class created by the firms who incurred risk by filing a significant number of complaints against the NFL?

RELATED CASES AND PROCEEDINGS

For purposes of this section, Zimmerman Reed adopts the Related Cases and Proceedings in the Joint Opening Brief of Appellants and Opening Brief of Appellant Locks Law Firm Addressing the Common Benefit Fee Allocation Order (18-2012) (Doc. 003113316560).

STATEMENT OF THE CASE

For purposes of this section, Zimmerman Reed adopts the Statement of the Case in the Joint Opening Brief of Appellants and Opening Brief of Appellant Locks Law Firm Addressing the Common Benefit Fee Allocation Order (18-2012) (Doc. 003113316560). Zimmerman Reed adds the following facts specific to the issues it raises on appeal:

Zimmerman Reed was an early contributor to the NFL concussion litigation. Starting in 2009, the Firm represented former NFL players in litigation concerning a publicity rights class action against the NFL, *Dryer, et al v. Nat'l Football League*, No. 09-CV-2182 (D. Minn. Aug. 20, 2009). *See* JA8142; JA6851. During the case, Zimmerman Reed noted unusually high rates of neurological complications among former players. JA8142. As a result, Zimmerman Reed met with Dr. Bennet Omalu – who had only recently discovered the link between NFL football and CTE – and key figures in the science of NFL head injuries to discuss the long-term effects of head injuries in the NFL. *Id.*

Early in its investigation, Zimmerman Reed organized meetings with attorneys ready to assist players in a concerted action against the NFL. JA8143. Zimmerman Reed also met in person and via teleconference with Jason Luckasevic throughout early 2011 to explore potential legal and factual claims and scientific theories. *Id.* On December 5, 2011, Zimmerman Reed, Hausfeld, PLLC, and Anapol Weiss convened the first organizational meeting of counsel in this litigation at Hausfeld's Washington DC offices. *Id*. There, the participants agreed upon a strategy of consolidating related cases in the Eastern District of Pennsylvania, pursuant to 28 U.S.C. § 1407. *Id*. Ultimately that plan was successful, as the case was transferred to the Eastern District of Pennsylvania by the Judicial Panel on Multidistrict Litigation and the participants filed a significant number of complaints that pushed this case towards an early settlement.

Due to the relationships formed during the *Dryer* case, former players retained Zimmerman Reed beginning in 2011 to pursue action against the NFL for head-related injuries. *Id*. By December 2011, Zimmerman Reed filed its first complaints against the NFL. *Id*. Zimmerman Reed ultimately filed a total of 350 complaints and was retained by more than 400 players. *Id*; *see also* JA6851.

After the formation of the MDL, the court appointed Charles Zimmerman of Zimmerman Reed to the Plaintiffs' Steering Committee ("PSC"). JA8143; JA6852. Zimmerman Reed worked at the request of Lead Counsel on a variety of matters,

including researching and drafting related to the NFL's motion to dismiss on preemption grounds, meeting with experts regarding a medical monitoring protocol, participating in leadership strategy meetings and activities, coordinating the participation of players for public relations and other efforts, and acquiring information necessary for settlement efforts. JA8143.

Throughout the litigation, and especially in the pre-Settlement stage of this case, Co-Lead Class Counsel, the PSC, and the Plaintiffs Executive Committee ("PEC") worked collectively to pursue this action against the NFL. JA8144. Consistent with a coordinated strategy, the substantial number of individual cases filed against the NFL reached a critical mass that in part pressured the NFL into early settlement negotiations and drew nationwide media attention. Part of that critical mass included Zimmerman Reed's more than 300 filed complaints and over 400 retained clients. *Id*. Zimmerman Reed undertook significant risk in filing these individual claims, hoping to pursue a common solution but prepared to litigate individual cases through trial and appeal. Eventually, by the work of the PSC, PEC, and Co-Lead Counsel, the Parties agreed upon a landmark settlement, obtaining a remarkable benefit to former players. *Id.*

Zimmerman Reed's work continued even after the preliminary approval of the settlement. *Id*. Shortly after the initial settlement was announced, Zimmerman Reed discovered significant confusion among the class concerning the substance of the

initial settlement, and later, the approved Settlement, and the relationship between law firms and their clients. *Id*. Some attorneys, law firms, and other organizations were apparently misrepresenting the Settlement benefits, misleading former players as to their attorney-client relationships and making unrealistic representations about potential services. *Id*. Zimmerman Reed also learned of attempts by some entities to provide unfair pre-Settlement loans and advances. *Id*.

In late 2013, Zimmerman Reed raised these issues with the PEC, PSC and Co-Lead Counsel. *Id*. To remedy those concerns, Co-Lead counsel instructed Zimmerman Reed to form an Ethics Committee and the PSC appointed Charles Zimmerman as Co-Chair. *Id*.

Zimmerman Reed worked to identify the entities contributing to the confusion, drafted reports and summaries for Co-Lead Counsel, and when authorized by Co-Lead counsel, sent cease and desist letters to wrongdoers. JA8144-45. From 2013 until early 2017, Zimmerman Reed continued to urge Co-Lead Counsel to address these issues because former players were growing increasingly confused as to who represented them, the role of PSC attorneys, and the qualifications for and benefits of the Settlement. JA8145. At the same time, clients were increasingly terminating their attorneys based on misleading tactics and unethical conduct by certain law firms attempting to grow their client bases. *Id*. Zimmerman Reed drafted a memorandum identifying the law firms and other

organizations spearheading efforts to mislead and solicit retained former players and presented its findings to Seeger Weiss with the recommendation that it take further action. *Id.*

The concerns over deceptive and unethical practices involving former NFL players also prompted the Consumer Financial Protection Bureau and the New York Attorney General to file a lawsuit against RD Legal Funding for purportedly offering unconscionable loans to former players. *Id*. Around the same time, the *New York Times* published an article highlighting the questionable practices by certain attorneys and lenders in the aftermath of the NFL Concussion Settlement.[1]

Seeger Weiss eventually followed Zimmerman Reed's recommendation to act against entities – some of whom Zimmerman Reed had previously identified as potential wrongdoers – that were causing confusion amongst the class. *Id*. Many former players would have avoided gross misunderstandings about the Settlement and remained with highly qualified counsel who originated this action had Seeger Weiss taken action sooner. Instead they were subjected to misinformation and were ultimately represented by attorneys who did not have the requisite experience or involvement in the case, or the best interests of the former players in mind. That detriment continues to negatively affect class members in the Settlement.

[1] *See* Ken Belson, *After N.F.L. Concussion Settlement, Feeding Frenzy of Lawyers and Lenders*, NY TIMES (July 16, 2016).

Despite its significant client base, its work on the early litigation of this case, and its efforts on the Ethics Committee, Seeger Weiss recommended no multiplier for Zimmerman Reed. JA7956. The court adopted Seeger Weiss's proposal and awarded Zimmerman Reed no multiplier. JA105. The court did not address Zimmerman Reed's efforts on the Ethics Committee.

SUMMARY OF ARGUMENT

1. The district court committed clear error in its May 24, 2018 Allocation Order because it accepted Seeger Weiss's recommendation that Zimmerman Reed's work on the Ethics Committee warranted no additional multiplier without evaluating Seeger Weiss's recommendation that it be awarded a multiplier for substantially similar work; and,

2. The district court committed clear error in its May 24, 2018 Allocation Order when it held that the risk of non-payment of a high volume of billed hours warrants a multiplier, but then inconsistently applied that holding to the PSC and PEC firms and when it failed to consider the risk of representing a large number of clients on a contingent basis in its multiplier analysis.

ARGUMENT

Zimmerman Reed joined the Locks' Law's Joint Opening Brief of Appellants (18-2012) (Doc. 003113316560). It writes separately to address two clear errors in the district court's fee allocation order. First, the court did not perform an

independent assessment of the Ethics Committee's work and whether that work benefited the class and as such, warranted a multiplier. Instead, the court adopted Seeger Weiss's position that the Ethics Committee work did not warrant a multiplier even though Seeger Weiss relied on nearly identical work to justify its significant multiplier. Second, the court's assessment of Seeger Weiss's risk was clearly erroneous in concluding the risk of non-payment of a large lodestar was the type of risk that warranted a multiplier but then inconsistently applying that determination to Zimmerman Reed.

A. The Court Committed Clear Error Adopting Seeger Weiss's Recommendation that Members of the Ethics Committee Receive No Multiplier.

The district court improperly adopted Seeger Weiss's recommendation that the Ethics Committee's work, including Zimmerman Reed's work as Co-Chair, warranted no multiplier. Where the district court "fails to apply the proper procedures in making the determination, or bases an award upon findings of fact that are clearly erroneous[,]" the court has abused its discretion in allocating attorneys' fees. *See In re Diet Drugs*, 582 F.3d 524, 538 (3d Cir. 2009) (citing *In re Cendant Corp. PRIDES Litig.,* 243 F.3d 722, 727 (3d Cir. 2001)); *see also In re High Sulfur Content Gasoline Prod. Liab. Litig.*, 517 F.3d 220, 227 (5th Cir. 2008) ("In a class action settlement, the district court has an independent duty under Federal Rule of

Civil Procedure 23 to the class and the public to ensure that attorneys' fees are reasonable and divided up fairly among plaintiffs' counsel.").

Here, Seeger Weiss recommended that Ethics Committee members receive no multiplier for their work even though Seeger Weiss took credit for performing substantially similar tasks on behalf of the class. *See* JA7960-61. In its recommended allocation of attorney's fees, Seeger Weiss justified its significant multiplier by highlighting efforts it took to prevent confusion among the class about the Settlement and to rectify misleading statements made to class members. JA7960-61 (noting it investigated "misleading solicitations and improper practices in early 2017" out of concern that "profiteers might confuse or unduly influence Class Members, who may be more susceptible to deceptive tactics by reason of neurocognitive impairments, other ailments, age, financial distress, or some combination of all of these factors.").

Zimmerman Reed brought this very same issue to Co-lead Counsel in 2013. From the formation of the Ethics Committee in 2013 through early 2017, Zimmerman Reed led the effort to identify the entities making misleading statements and false promises. During that time, Seeger Weiss largely ignored the Committee's efforts. Once the issue gained public traction, however, Seeger Weiss, as was its practice in this case, unilaterally took over the effort initiated by the Ethics

Committee. *See, e.g.*, JA526 (Doc. 8037) ("Notice and Order Setting Hearing re: Deceptive Practices Targeting Settlement Class Members . . . .").[2]

In its fee order, the district court failed to address Seeger Weiss's conflicting views on whether the work to prevent and remedy deceptive statements benefited the class and warranted a multiplier. Rather, the court adopted Seeger Weiss's recommendation wholesale. *See, e.g.*, JA92 (stating that it had to "respect [Seeger Weiss's] unique position in evaluating the impact of the committee's work on the over-all settlement, and . . . accept [Seeger Weiss's] conclusion about the proper multiplier to be used."). The court barely acknowledged the work Zimmerman Reed performed as the Co-Chair and lead advocate on the Ethics Committee, instead stating only that Zimmerman Reed "served on" the committee. *See* JA105. Moreover, the court provided no discussion at all of whether the Ethics Committee's work warranted a multiplier or whether Seeger Weiss's recommendation was fair or valid in light of its recommendation that similar work be considered when awarding its multiplier.

The district court's failure to scrutinize Seeger Weiss's recommendation that it be credited for certain work but that Zimmerman Reed not be credited for similar work on the Ethics Committee is clearly erroneous. *See, e.g.*, *In re Diet Drugs*, 401

[2] The hearing on deceptive practices was triggered in part by the *New York Times* article discussing the same issues. *See* Belson, *infra* note, 1.

F.3d 143, 173 (3d Cir. 2005) (Ambro, J., concurring) (noting the need "to examine critically decisions of non-judicial bodies that may have a financial interest in the outcome of their decisions or recommendations" and that "when a conflict of interest is present, the reviewing court should consider on a fact-basis how much deference should be afforded to the views of a group potentially affected by self-dealing.").

B. The Court Erred in Its Analysis of the Risk Incurred During the Litigation.

Zimmerman Reed agrees with Locks Law Firm's discussion of the infirmities in the court's analysis of the risk in this case. *See* Doc. 003113316560 at 24-29. Zimmerman Reed adds only the following points concerning the court's erroneous analysis of the comparative risks incurred by firms retained by a significant number of players and those who billed a significant lodestar.

Agreeing with Seeger Weiss, the court concluded that the "risk that should be paid through a class benefit multiplier" is the risk incurred by "attorneys who worked a high volume of hours advancing the interest of the Class . . . ." JA89. Using that logic, the court awarded the highest multiplier by far to Seeger Weiss who also had the highest lodestar. The court, in clear error, failed to apply that conclusion consistently to the PSC and PEC members and to provide adequate reasoning for its position.

Assuming the court's reasoning was sound, it did not apply its conclusion that large lodestars warrant increased multipliers equally to all firms who billed a

significant lodestar in this case. Of the 26 firms who were allocated attorney's fees, Zimmerman Reed, for example, billed the eighth highest lodestar but received the second lowest multiplier. *See* JA91-105 (awarding a multiplier of "1" to Zimmerman Reed where the only lower multiplier awarded was ".75"); JA7956 (listing lodestars). Despite recognizing that "[e]very attorney involved in the litigation has taken on the risk that work will be performed but no payment will be received," the court's awarded multipliers have almost no correlation to the actual lodestar accumulated except for that of Seeger Weiss, who had the largest lodestar and received the largest multiplier. JA89. That result is completely inconsistent with the court's assessment of the correlation between risk and a multiplier.

Moreover, the court's reasoning in evaluating the risk is fatally flawed because it incorrectly evaluated the benefit to the class when a law firm represents a significant number of clients. The firms retained by a significant number of players absorbed additional risk of non-settlement (beyond the risk of non-payment of their lodestar) by committing to litigate numerous individual cases. The court concluded that risk was not incurred for the benefit of the class, but for the benefit of the individual class members. JA89. However, that risk did benefit the class. It created a groundswell of litigation that caused the NFL to compare the risk of litigating thousands of cases versus settling, thereby pushing this action to an early conclusion. *See e.g. In re Diet Drugs*, 582 F.3d 524, 547 (3d Cir. 2009) ("the number and

cumulative size of the massed cases created a penumbra of class-type interest on the part of all litigants and of public interest on the part of the court and the world at large." (quoting *In re Air Crash Disaster at Fla. Everglades on Dec. 29, 1972*, 549 F.3d 1006, 1012 (5th Cir. 1977)). Indeed, including a significant number of former NFL players in this litigation was part of the agreed-upon strategy to push this case towards an early settlement.

The court dismissed the benefit of the "critical mass" with little explanation, instead concluding it was actually the "attorneys who worked a high volume of hours" that "incurred a high risk for the Class." JA89. That position is untenable. While it is true that billing a large lodestar also creates a risk of non-payment, it is not true that allowing one firm to bill the majority of that lodestar created an incremental benefit to the class over and above a circumstance where Seeger Weiss worked collaboratively with the other court-appointed firms. *See, e.g.*, *In re Actos (Pioglitazone) Prod. Liab. Litig.*, 274 F. Supp. 3d 485, 515 (W.D. La. 2017) (describing the benefits of requirements that "all attorneys who requested work and who were qualified and capable to do that work, were to receive work [from co-lead counsel] . . . ."). The court appointed numerous capable and experienced firms to the PSC and PEC who were ready and willing to contribute to the case. Seeger Weiss, however, chose to assign itself nearly as much billable work as it assigned to the entire PSC and PEC combined. Seeger Weiss's willingness to unilaterally bill

such a massive lodestar might indicate that it viewed a high likelihood of settlement and the risk of non-payment to be low.

The court's position on the risk of non-payment of a lodestar also failed to consider the opinions of Professor Rubenstein, a court-appointed expert who analyzed the changing degree of risk that existed as the litigation progressed. Professor Rubenstein noted that the risk of the litigation decreased after the formation of the MDL, and then again after preliminary approval of the settlement. *See* JA8305-06. While the court used that fact to justifiably limit firms' contingency fees in individual retainer agreements, there is no indication it used that determination to evaluate the degree of risk incurred by Seeger Weiss. Undoubtedly, as the settlement progressed, Seeger Weiss's risk of non-payment decreased and its incentive to assign itself a substantial majority of the work increased. The court assumed without any explanation that the risk of non-payment on "a high volume of hours" was the same throughout the course of the litigation and settlement.[3]

[3] This issue is further complicated by the fact that Seeger Weiss's time records were not subject to scrutiny. *See* Doc. 003113316560 at 24-29. The inability to scrutinize Seeger Weiss's time records prevents any adversarial assessment of the risk Seeger Weiss incurred. If, for example, a majority of Seeger Weiss's lodestar was incurred after preliminary approval, then the risk of non-payment was significantly reduced (especially given the substantial attorney's fees included in the Settlement) as compared to the lodestar billed prior to the Settlement. That assessment cannot be validly made without reviewing Seeger Weiss's time records.

These are facts the court simply did not address in its matter-of-fact conclusion that Seeger Weiss's risk of non-payment of its lodestar outweighed (by significant multiples) the risk incurred by firms retained by a significant number of clients. Even if its conclusion were valid, however, the court failed to equally apply that conclusion to all firms when awarding a multiplier, committing clear error.

CONCLUSION

Zimmerman Reed respectfully requests that this Court vacate the district court's order allocating common-benefit fees and remand with instructions that the court appropriately consider the work performed by the Ethics Committee and the risk incurred by the firms who represented a significant number of players.

Dated: September 9, 2019

Respectfully submitted,

s/ J. Gordon Rudd, Jr.

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I hereby certify that the signatory of this motion, J. Gordon Rudd, Jr., is a member of the bar of this Court. I further certify that no privacy redactions were necessary for this filing. Finally, I certify that the text of the electronic brief is identical to the text in the paper copies.

Dated: September 9, 2019

s/ J. Gordon Rudd, Jr.
J. Gordon Rudd, Jr.

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This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3330 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

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Dated: September 9, 2019

s/ J. Gordon Rudd, Jr.
J. Gordon Rudd, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and I hereby certify that a true copy of the foregoing was served via CM/ECF on all counsel of record.

Dated: September 9, 2019

s/ J. Gordon Rudd, Jr.
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